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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOHN STRADA et al.,

Plaintiffs and Respondents,

v.

JS STADIUM, LLC et al.,

Defendants and Appellants.

G041915

(Super. Ct. No. 06CC00262)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, David C. Velasquez, Judge. Affirmed.

Hart, King & Coldren, Robert S. Coldren, James S. Morse, and Beau M. Chung for Defendants and Appellants.

The Law Offices of Kent G. Mariconda and Kent G. Mariconda for Plaintiffs and Respondents.

Defendants JS Stadium, LLC, Shorecliff LP, Shorecliff Main LP, Huntington BSC Park, LP, and JS Commercial, LLC (the New Owners) appeal from an order denying their petition to compel arbitration with five residents of their mobile home park. They further appeal from an order denying their motion to unseal court documents relating to the motion of plaintiffs' counsel to be relieved as counsel.

We affirm. As for the arbitration motion, the New Owners have not shown the existence of any arbitration agreement with three of the residents. And compelling arbitration with any of the five residents would create the possibility of inconsistent rulings between the arbitration and this class action brought on behalf of other residents. And as for the motion to unseal, the attorney-client privilege provides an overriding interest protected from prejudice by no less intrusive means than sealing.

## FACTS

### *The Complaint*

Plaintiffs Brenda Louise Wooten-Schock, Charles Wrenn Schock, and Golden State Mobile-Home Owners League — Chapter 571, individually and on behalf of similarly situated residents of the Huntington Shorecliffs Mobile Home Park (the park), sued the park's owners and managers in December 2006. The initial named defendants were MMR Family LLC, RFR Family LLC, Bendetti Associates Incorporated, William C. Meacham, and Northwind Management, Inc. (the Prior Owners).

Plaintiffs asserted causes of action including breach of contract and fraud. They alleged the Prior Owners had unilaterally terminated their lease (the 1986 lease) with the residents, which had provided for a five-year term with automatic renewals for 30 years. The Prior Owners tried to force the residents to accept a new lease (the 2006 lease) with "illegal, unfair, and fraudulent terms."

Plaintiffs asserted their claims as a class action. They defined a class of residents “who have: (1) been charged illegal fees and/or ‘pass-throughs’ in violation of the MRL [Mobile Home Residency Law, Civil Code section 798 et seq.]; and/or (2) who have or will be affected by disregard of the written and/or implied long-term lease provisions and/or limited rental increases afforded by The 1986 Lease as established by the statements, representations, promises and conduct of defendants; and/or (3) who have been or will be affected by enforcement of the illegal lease provisions of The 1986 Lease” They alleged the class had at least 300 members.

Plaintiffs alleged common issues of fact and law predominated over any individual issues. These common issues included “(a) The rights and duties of the parties under the MRL and/or other applicable law as well as defendants’ violation of those laws; [¶] (b) The rights and duties of the parties under The 1986 Lease; [and] [¶] (c) The rights and duties, if any, of the parties under The 2006 Lease.”

The court allowed plaintiffs to file a second amended complaint in December 2008. Plaintiffs alleged the Prior Owners sold the park in January 2008 and added the New Owners as named defendants. Plaintiffs had already added as named plaintiffs the following park residents: John Strada, Roger D. Criswell, Ernie Bohl, Joan Walker, Ken Bennett, and Shirley Lewis.<sup>1</sup>

Meanwhile, other park related litigation had arisen. The Prior Owners had sued certain park residents for declaratory relief concerning rent increases made pursuant to the alleged month-to-month tenancies. (*MMR Family LLC v. Lupo* (Super. Ct. Orange County, 2007, No. 07CC01257).) And certain park residents filed a class action against the Prior Owners, the New Owners, and park management, alleging that landscaping and

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<sup>1</sup> The record does not contain a first amended complaint, which presumably added these new named plaintiffs.

other work at the park had caused water damage to their homes. (*Criswell v. MMR Family LLC* (Super. Ct. Orange County, 2007, No. 07CC01416).)<sup>2</sup>

### *The Arbitration Motion*

In January 2009, the New Owners moved to compel arbitration with the following named plaintiffs: Charles Wrenn Schock, Ernie Bohl, Joan Walker, Kenneth Bennett, and Shirley Lewis (the Arbitration Plaintiffs). The New Owners stated the Arbitration Plaintiffs had executed written arbitration agreements covering the complaint's claims. They attached several copies of an "Amendment to Lease" dated July 1990, initialed by the Arbitration Plaintiffs. The 1990 amendment consisted solely of a three-page arbitration agreement providing that "any dispute between us with respect to the provisions of this agreement and tenancy in the community shall be submitted to arbitration conducted under the provisions of Code of Civil Procedure §§ 1280, et seq."

Plaintiffs contended no arbitration agreement existed between the New Owners and Arbitration Plaintiffs Schock, Bohl, and Walker. They stated the Prior Owners terminated the 1986 leases of Schock, Bohl, and Walker, and New Owners had not alleged they and Schock, Bohl, and Walker were still parties to the 1986 lease or the 1990 amendment.

Plaintiffs offered documentary evidence to support these claims. Plaintiffs submitted copies of a 2005 letter from park management to Schock, Bohl, and Walker, stating their leases would be terminated effective February 1, 2006. They also provided a copy of the subsequent 2006 Lease between the Prior Owners and Bohl, as well as a declaration from Walker stating she signed the 2006 Lease. Finally, they submitted a

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<sup>2</sup> We grant appellants' request to take judicial notice of the complaint filed in this action, which is the subject of the related appeal in *Criswell v. JS Stadium* (G041921, app. pending).

copy of a 2006 letter from park management to Schock stating that his 1986 Lease had been “cancelled” and he would be subject to a month-to-month rental agreement because he failed to sign a new written lease.

Plaintiffs conceded arbitration agreements still existed between Prior Owners and Arbitration Plaintiffs Bennett and Lewis, whose 1986 leases had not been purportedly terminated. But they contended compelling arbitration with Bennett and Lewis could create a possibility of conflicting rulings on common issues regarding the remaining plaintiffs’ claims.

The court denied the arbitration motion. It found “[a]s to plaintiffs Schock, Bohl, and Walker, there is no written agreement to arbitrate inasmuch as the 1990 “Amendment to Lease” applies to the 1986 lease and the 1986 lease was unilaterally terminated by the mobile home park’s former owner. Further, the purported current lease (2006 lease) replaced the former lease” and it “has no arbitration clause.” The court further found the arbitration agreement was procedurally and substantively unconscionable and that compelling arbitration with “only some of the members of the instant class may create conflicting rulings on issues common to the other parties in the instant action as well as issues overlapping the issues in the companion cases, primarily the MMR v. Lupo action.”

### *The Motion to Unseal*

The New Owners also moved to unseal documents relating to plaintiffs’ counsel’s motion to be relieved as counsel to plaintiffs Schock and Wooten-Schock. The court had held a hearing on the motion to be relieved, though it cleared the courtroom except for plaintiffs’ counsel and five named plaintiffs in this and related actions.<sup>3</sup> The

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<sup>3</sup> The plaintiffs present for the hearing were Schock and Wooten-Schock (named plaintiffs in this case); Sharon Dana and Roger Criswell (named plaintiffs in *Criswell v. MMR Family LLC* (Super. Ct. Orange County, No. 07CC01416)); and Robert

court had granted the motion and ordered sealed, sua sponte, the hearing transcript and declarations supporting the motion. The New Owners contended no overriding interest required sealing. They further claimed the court failed to make required findings that an overriding interest exists for sealing the documents, a substantial probability exists of prejudicing that interest absent sealing, the sealing is narrowly tailored to serve that interest, and no less restrictive means would achieve that interest.

The court denied the motion to unseal. It found “the argument of counsel and his client in the closed court session constituted a confidential communication between the attorney and his client. The court was a necessary party to the communication — determination of the motion to relieve counsel as the attorney of record for the plaintiffs in the case.”

The court also found the attorney-client privilege created an “overriding interest” in sealing the documents and that “no less intrusive means” existed to protect the privilege. It found, “the need to protect confidential and privileged communications between the clients and their attorney is an overriding interest supporting sealing the court record. There is a substantial probability, in fact an absolute certainty, that the interest in protecting privileged communications will be prejudiced unless the record is sealed. The records which the court ordered sealed are narrow in scope, relating only and specifically to the hearing of the motion to relieve counsel, and the related documents. Thus, the order sealing the records is narrowly tailored to serve the overriding interest in protecting privileged communications. There is no less intrusive means to achieve the overriding interest in protecting the privileged communications between clients and their attorney.”

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Lupo (named defendant in *MMR Family LLC v. Lupo* (Super. Ct. Orange County, No. 07CC01257)).

## DISCUSSION

### *The Court Correctly Denied the Arbitration Motion*

Two grounds exist for affirming the denial of the arbitration motion. First, the New Owners failed to establish the existence of any arbitration agreement with three of the Arbitration Plaintiffs. Second, compelling arbitration with any of the five Arbitration Plaintiffs would create the possibility of conflicting rulings on common issues among the arbitration, this action, and the related pending actions.

“‘The party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement. [Citations.] Petitions to compel arbitration are resolved by a summary procedure that allows the parties to submit declarations and other documentary testimony and, at the trial court’s discretion, to provide oral testimony. [Citations.] If the facts are undisputed, on appeal we independently review the case to determine whether a valid arbitration agreement exists.’” (*Warfield v. Summerville Senior Living, Inc.* (2007) 158 Cal.App.4th 443, 446-447 (*Warfield*).)

The parties make competing, unsupported factual assertions in their briefs, but no real evidentiary dispute exists. Plaintiffs do not dispute the authenticity of the 1990 amendment submitted by the New Owners. And the New Owners do not dispute the authenticity of the documentary evidence — the letters from park management, Bohl’s 2006 lease, and the Walker declaration — submitted by plaintiffs. Thus, we will independently determine the existence of the arbitration agreement.

The New Owners fail to meet their burden of showing an arbitration agreement exists between them and three of the Arbitration Plaintiffs. The undisputed evidence shows Schock, Bohl, and Walker executed the 1990 amendment containing the arbitration agreement. But plaintiffs’ un rebutted documentary evidence shows the Prior Owners purported to terminate the 1986 leases of Schock, Bohl, and Walker in 2006 — two years before the New Owners bought the park. This purported termination is in

dispute in pending trial court actions. While we express no opinion on the purported termination, it prevents us from assuming in the absence of evidence that the 1986 lease or the 1990 amendment thereto are still in effect. As the moving parties seeking to compel arbitration, the New Owners must show the purported termination was not effective. They have not done so. Because the New Owners have not affirmatively shown an existing arbitration agreement, the court properly refused to compel arbitration. (See *Warfield, supra*, 158 Cal.App.4th at p. 446 [moving party must prove existence of arbitration agreement]; cf. *Brodke v. Alphatec Spine, Inc.* (2008) 160 Cal.App.4th 1569, 1574 [party cannot compel arbitration while denying existence of contract containing arbitration agreement].)

The New Owners do not even claim Schock, Bohl, and Walker are still bound by the 1986 lease. They assert the status of the 1986 lease is immaterial because the 1990 amendment is a separate contract. This is absurd. The 1990 amendment is entitled, “AMENDMENT TO LEASE.” It provided that its terms are “added to the [1986] Lease . . .” and “[t]his Amendment will become a permanent part of the Lease and will be binding on all persons to whom the Lease is assigned or otherwise transferred in the future.”

The New Owners’ cited cases do not help their cause. *Prima Paint v. Flood & Conklin* (1967) 388 U.S. 395, holds an arbitration agreement is “separable” from the underlying contract in the sense that a party cannot avoid arbitration by asserting the contract was fraudulently induced — the arbitrator must decide that issue. (*Id.* at p. 402.) *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, holds a party may compel arbitration pursuant to a contract it asserts is voidable. (*Id.* at pp. 1198-1199.) Neither case allows a party to compel arbitration without pleading and proving the existence of the arbitration agreement in question.<sup>4</sup>

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<sup>4</sup> At oral argument, the New Owners’ counsel claimed the New Owners were assigned the 1986 lease when they purchased the park. Counsel then recited from

The New Owners cannot inject themselves into an arbitration agreement they have not shown still exists by invoking the public policy favoring arbitration. Public policy “does not come into play . . . until a court has found the parties entered into a valid contract under state law” to arbitrate. (*Metters v. Ralphs Grocery Co.* (2008) 161 Cal.App.4th 696, 701.) The New Owners fail to show any such contract exists as to Schock, Bohl, and Walker, dooming their arbitration claim.<sup>5</sup>

Moreover, as to all five Arbitration Plaintiffs, the court permissibly declined to compel arbitration due to the possibility of creating inconsistent rulings. A court need not compel arbitration when “[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact.” (Code Civ. Proc., § 1281.2, subd. (c).) “[T]he proper interpretation and application of section 1281.2, subdivision (c), is a legal question reviewed de novo. [Citations.] If the statute is properly invoked, then we review under the abuse of discretion standard the trial court’s decision to refuse to compel arbitration . . . .” (*Birl v. Heritage Care LLC* (2009) 172 Cal.App.4th 1313, 1318 (*Birl*).)

The court correctly found conflicting rulings on common issues would be possible if it compelled arbitration between the Arbitration Plaintiffs and the New Owners. The Arbitration Plaintiffs are named plaintiffs in this class action brought on behalf of their fellow residents. This litigation arises from the same alleged transaction

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pleadings in this case. Unproven allegations are not evidence of an existing arbitration agreement. And even in their pleadings, the New Owners do not allege they were assigned the 1986 lease — just all “claims, right, and interests concerning or involving the [park].” This silence as to the 1986 lease is telling because plaintiffs’ evidence states the 1986 leases of Schock, Bohl, and Walker were terminated before the New Owners purchased the park. The status of those leases remains to be determined in the trial court.

<sup>5</sup> For the same reasons, the court correctly declined to compel judicial reference with the Arbitration Plaintiffs pursuant to another provision of the 1990 amendment.

that would be resolved in the arbitration — in short, the purported termination of the 1986 Lease and the subsequent imposition of the 2006 Lease and the month-to-month tenancies. This raises the possibility of conflicting rulings on common issues of fact and law including, without limitation, the existence and enforceability of the 1986 and 2006 Leases and the month-to-month tenancies. These common issues are also raised, in one way or another, in the related pending actions. (*Wooten-Schock v. MMR Family LLC* (Super. Ct. Orange County, *supra*, No. 06CC00262 [causes of action include breach of contract (the 1986 Lease)]; *MMR Family LLC v. Lupo* (Super. Ct. Orange County, *supra*, No. 07CC01257) [cause of action for declaratory relief regarding the month-to-month tenancies].)

Given these possibilities of conflicting rulings, the court was well within its discretion to decline to compel arbitration with any of the five Arbitration Plaintiffs, even those for whom an arbitration agreement existed. (See *Birl*, *supra*, 172 Cal.App.4th at p. 1322 [the court “did not misapply the law or abuse its broad discretion in denying the motion to compel arbitration” where conflicting rulings were possible]; see also *Fitzhugh v. Granada Healthcare and Rehabilitation Center, LLC* (2007) 150 Cal.App.4th 469, 475-476 [affirming court’s exercise of discretion to deny motion to compel rather than stay arbitration].)

#### *The Court Correctly Denied the Motion to Unseal*

An order on a motion to seal or unseal documents is appealable as a ““final determination of a collateral matter . . . .”” (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 77 [order granting motion to unseal]; accord *In re Marriage of Lechowick* (1998) 65 Cal.App.4th 1406, 1410 [order denying motion to unseal].)

The New Owners’ primary claim is that the court failed to make required findings when it sealed the transcript and declarations regarding the motion to be relieved as counsel. “[B]efore substantive courtroom proceedings are closed or transcripts are

ordered sealed, a trial court must hold a hearing and expressly find that (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest.” (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1217-1218, fns. omitted.)

The court eventually made these required findings when it denied the motion to unseal. The court found (i) “the argument of counsel and his client in the closed court session constituted a confidential communication between the attorney and his client” and “the need to protect confidential and privileged communications between the clients and their attorney is an overriding interest supporting sealing the court record”; (ii) “[t]here is a substantial probability, in fact an absolute certainty, that the interest in protecting privileged communications will be prejudiced unless the record is sealed”; (iii) “The records which the court ordered sealed are narrow in scope, relating only and specifically to the hearing of the motion to relieve counsel, and the related documents. Thus, the order sealing the records is narrowly tailored to serve the overriding interest in protecting privileged communications”; and (iv) “[t]here is no less intrusive means to achieve the overriding interest in protecting the privileged communications between clients and their attorney.”

We will not reverse the court for a failure to make findings that it has since made. “In the light of the record in this case it would be supererogation of the highest degree to reverse and remand the case to accomplish what already has been done.” (*City of San Marcos v. California Highway Com.* (1976) 60 Cal.App.3d 383, 396 [no reversal where court eventually made findings to support judgment]; accord Civ. Code, § 3532 [“The law neither does nor requires idle acts”].)

The New Owners also challenge the merits of the court’s determination. They contend the hearing did not implicate the attorney-client privilege or that the

privilege was waived at the hearing, and that the hearing constituted an improper ex parte communications on a substantive matter. But the New Owners give us no record against which we can review these claims. They did not include the motion to be relieved as counsel in their appellants' appendix. They did not ask the court clerk to transmit the sealed documents. We cannot determine what happened at the hearing.

“Judgments and orders are presumed correct on appeal, and the appellant bears the burden of overcoming that presumption by affirmatively demonstrating reversible error. [Citations.] The appellant must provide an adequate record to demonstrate that error.” (*Forrest v. Department of Corporations* (2007) 150 Cal.App.4th 183, 194 [affirming order granting motion to withdraw because appellant “has not provided a record of the in camera hearing”].) The New Owners have not provided any record demonstrating error by the court in denying the motion to unseal. We therefore presume its order was correct.

#### DISPOSITION

The orders are affirmed. Plaintiffs shall recover their costs on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.